

Ipmuda Borneo Sdn Bhd v Richallenge Corp Sdn Bhd

A

HIGH COURT (KOTA KINABALU) — COMPANIES (WINDING UP)
NO BKI-28–22/5 OF 2013
CHEW SOO HO J
9 DECEMBER 2013

B

Civil Procedure — Winding up — Petition — Allegation respondent was still indebted to petitioner being price for goods sold and delivered by petitioner to respondent — Whether petitioner a creditor — Whether petitioner had judgment of court against respondent — Whether disputed sum claimed

C

Vide a petition for winding up ('encl 1'), the petitioner prayed for the orders that the respondent be wound up under the Companies Act 1965; that the official receiver be appointed as the liquidator; and that the costs of this petition be paid out of the assets of the respondent company. The basis of the petition was that as at 31 January 2013, the respondent was still indebted to the petitioner in the sum of RM1,382,870.55 inclusive of interest at the rate of 2% per month charged on all overdue account, being the price for the goods sold and delivered by the petitioner to the respondent. In opposing the petition, the respondent argued that the petitioner was not a creditor since the petitioner did not have a judgment of court against the respondent; and the respondent had made payments in the total sum of RM350,000 and therefore the amount said to be due and owing by the petitioner was disputed. The respondent disputed the rate of interest being charged for overdue payment on the ground of conflicting terms as to the rate of interest where the petitioner imposed the rate of 2% while the petitioner's statement of account stated interest of 1.5% would be charged on overdue account. Thus, the respondent contended that the debt claimed by the petitioner was disputed and winding up petition should not be allowed and that the dispute should be decided in a civil suit. The sole issue before the court was whether the petitioner was a creditor and that the alleged debt in the sum of RM1,382,870.55 was bona fide disputed.

D

E

F

G

Held, allowing the application:

H

- (1) The petitioner needed not obtained a judgment of court before proceeding on winding up of the respondent for the reason that there is no such requirement under the Companies Act 1965 or any law. So long that a debt is proved and that the respondent had failed, refused and/or neglected to pay the debt, s 218(1)(e) and (2)(a) of the Companies Act 1965 could be invoked to pursue a winding up proceeding (see para 5).
- (2) A unilateral request for time to make payment towards settlement of a debt due and owing cannot be construed as a negotiation for settlement.

I

- A From the respondent's letters, there was never any denial or dispute over the sum still due and owing to the petitioner or any disapproval of the rate of interest charged by the petitioner for overdue payments. The respondent had never indicated that it is disputing the petitioner's debt as reflected in the statement of account forwarded to the respondent but
- B they reflected a tacit admission of the debt when they sought for time to make payment. Even in this proceeding, the respondent's contention of its dispute of the debt is basically on the part payment of RM350,000 which was allegedly wrongly credited towards the statement of overdue interest and not towards the principal debt as well as the alleged variance of interest but not the principal debt (see para 7).
- C
- (3) The respondent had not raised a bona fide dispute over the debt still due and owing to the petitioner nor that it had rebutted the deeming provision under s 218(2)(a) read with s 218(1)(e) of the Companies Act 1965. The fact that the respondent had revenue which was forthcoming was no ground to refute the fact that respondent was unable to pay or settle its debt still due and owing to the petitioner under s 218(2)(a) read together with s 218(1)(e) of the Companies Act 1965 after a legal notice had been duly served on the respondent (see paras 10–11).
- D
- E

[Bahasa Malaysia summary]

- Melalui petisyen penggulungan ('lampiran 1'), pempetisyen telah memohon bagi perintah-perintah agar responden digulung di bawah Akta Syarikat 1965; bahawa penerima rasmi dilantik sebagai pelikuidasi; dan bahawa kos petisyen ini dibayar melalui aset-aset syarikat responden. Asas petisyen ini adalah bahawa pada 31 Januari 2013, responden masih berhutang dengan pempetisyen bagi jumlah RM1,382,870.55 termasuk faedah pada kadar 2% yang dikenakan atas akaun hutang, iaitu bayaran bagi barangan yang dijual dan dihantar oleh pempetisyen kepada responden. Dalam menentang petisyen, responden menghujahkan bahawa pempetisyen bukanlah pemiutang kerana pempetisyen tidak mempunyai penghakiman mahkamah terhadap responden; dan bahawa responden telah membuat bayaran berjumlah RM350,000 dan dengan itu, jumlah yang terutang terhadap pempetisyen dipertikaikan.
- F
- G
- H Responden mempertikaikan kadar faedah yang dicaj bagi pembayaran tertunggak atas alasan konflik terma kerana kadar faedah yang mana pempetisyen mengenakan 2% manakala penyata akaun pempetisyen menyatakan bahawa faedah 1.5% akan dikenakan bagi akaun tertunggak. Oleh itu, responden menghujahkan bahawa hutang yang dituntut oleh pempetisyen dipertikaikan dan petisyen penggulungan tidak sewajarnya dibenarkan dan bahawa pertikaian harus diputuskan dalam guaman sivil. Satu-satunya isu di mahkamah adalah sama ada pempetisyen merupakan pemiutang dan bahawa hutang yang didakwa berjumlah RM1,382,870.55 dipertikaikan secara bona fide.
- I

Diputuskan, membenarkan permohonan:

- (1) Pempetisyen tidak perlu mendapatkan penghakiman mahkamah sebelum prosiding penggulungan responden atas alasan bahawa keperluan tersebut tidak wujud di bawah Akta Syarikat 1965 atau mana-mana undang-undang. Selagi hutang dibuktikan dan responden gagal, enggan dan/atau cuai dalam membayar hutang tersebut, s 218(1)(e) dan (2)(a) Akta Syarikat 1965 tidak boleh dibangkitkan untuk meneruskan dengan prosiding penggulungan (lihat perenggan 5).
- (2) Permohonan unilateral untuk membayar penyelesaian hutang tidak boleh dianggap satu perbincangan untuk penyelesaian. Berdasarkan surat-surat responden, tiada penafian atau pertikaian mengenai jumlah yang masih terhutang terhadap pempetisyen atau sebarang penolakan kadar faedah yang dikenakan oleh pempetisyen bagi jumlah-jumlah tertunggak. Responden tidak pernah menyatakan bahawa ia mempertikaikan hutang pempetisyen seperti yang dizahirkan dalam penyata akaun yang dikemukakan kepada responden tetapi ia menunjukkan pengakuan tersirat hutang semasa mereka memohon masa untuk membuat pembayaran. Malah dalam prosiding ini, hujahan responden mengenai pertikaian hutang adalah pada asasnya mengenai bayaran separa RM350,000 yang didakwa dikreditkan secara salah ke dalam penyata tunggakan faedah dan bukan terhadap hutang utama serta dakwaan pemelbagaian faedah tetapi bukan hutang utama (lihat perenggan 7).
- (3) Responden tidak membangkitkan pertikaian bona fide atas hutang pempetisyen dan ia tidak menyangkal peruntukan di bawah s 218(2)(a) dibaca bersama-sama dengan s 218(1)(1) Akta Syarikat 1965. Fakta bahawa responden mempunyai pendapatan akan datang bukanlah alasan untuk menidakkan fakta bahawa responden tidak mampu membayar atau menyelesaikan hutang tertunggak kepada pempetisyen di bawah s 218(2)(a) dibaca bersama-sama dengan s 218(1)(e) Akta Syarikat 1965 selepas notis guaman telah diserahkan kepada responden (lihat perenggan 10–11).]

Cases referred to

- Campana Distributor Sdn Bhd v Amseal Engineering (M) Sdn Bhd* [1998] 7 MLJ 677; [1998] 2 CLJ Supp 12, HC (refd)
- Daya Anika Sdn Bhd v Kuan Ah Hock* [1998] 6 MLJ 537; [1998] 5 CLJ 200, HC (refd)
- Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17, FC (refd)
- Ted Bates (M) Sdn Bhd v Balbir Singh Jholl* [1979] 2 MLJ 257, FC (refd)

A Legislation referred to

Companies Act 1965 s 218(1), 218(1)(e), 218(2)(a)
Evidence Act 1950 ss 102, 103

Peterson (Ho Chong Yong) for the plaintiff.

B *Brandon Soh (Ronny Cham & Co) for the defendant.*

Chew Soo Ho J:

INTRODUCTION

C

[1] Vide encl 1 petition for winding up, the petitioner prays for the orders of court that the respondent may be wound up under the Companies Act 1965, that the official receiver be appointed as the liquidator and that the costs of this petition be paid out of the assets of the respondent company.

D

[2] The basis of the petition is that as at 31 January 2013, the respondent is still indebted to the petitioner in the sum of RM1,382,870.55 inclusive of interest at the rate of 2% per month charged on all overdue account, being the price for the goods sold and delivered by the petitioner to the respondent; the statement of account dated 31 January 2013 is as shown in exh A annexed to the petition as verified by the director of the petitioner in his affidavit verifying the petition (encl 2).

E**F**

[3] The respondent in opposing this petition contended that the petitioner is not a creditor since the petitioner does not have a judgment of court against the respondent. Secondly, it was contended that the total amount claimed by the petitioner as still due and owing by the respondent is disputed by the respondent as the respondent had made payments in the total sum of RM350,000 ie on 17 December 2012 (RM150,000), 24 December 2012 (RM50,000) and 21 January 2013 (RM150,000) which was made to the petitioner to reduce the principal amount owing to the petitioner but was nevertheless being credited to off-set interest. Thirdly, respondent disputes the rate of interest being charged for overdue payment on ground of conflicting terms as to the rate of interest where the petitioner imposed the rate of 2% while the petitioner's statement of account dated 31 January 2013 (exh A) stated interest of 1.5% would be charged on overdue account. Thus, the respondent contended that the debt claimed by the petitioner is disputed and winding up petition should not be allowed and that the dispute should be decided in a civil suit.

G**H****I**

THE ISSUE

A

[4] The sole issue before this court is whether the petitioner is a creditor and that the alleged debt in the sum of RM1,382,870.55 is bona fide disputed.

[5] I do not find the contention that the petitioner must have obtained a judgment of court before proceeding on winding up of the respondent to be an issue for reason that there is no such requirement under the Companies Act 1965 or any law. So long that a debt is proved and that the respondent has failed, refused and/or neglected to pay the debt, s 218(1)(e) and (2)(a) of the Companies Act 1965 can be invoked to pursue a winding up proceeding.

B

C

FINDINGS OF COURT

[6] The undisputed facts in this case is that the petitioner pursuant to the respondent's application for credit account applied by the respondent from the petitioner (exh 'CCN3' annexed to the petitioner's affidavit in reply: encl 12), had sold and delivered goods to the respondent on credit terms of 60 days and that the statement of account (exh A) tendered to the respondent shows that the sum of RM1,382,870.55 from the running account of the respondent is still due and owing to the petitioner as at 31 January 2013. Primarily, the respondent did not dispute the fact that it is indebted to the petitioner for the goods sold and delivered by the petitioner and had in fact paid a total sum of RM350,000 towards part payment of the principal sum still due and owing which the respondent alleged that the petitioner had instead utilised to settle the interest sum still due and not towards the principal sum. On this point, I find that even assuming that the said part payment in the total of RM350,000 was credited towards the principal debt and not towards the interest, it cannot be denied that the principal sum still due and owing by the respondent to the petitioner would nevertheless still have well exceeded the RM500 for which the respondent had failed and/or neglected to pay in three weeks upon the notice under s 218(1) of the Companies Act 1965 having been issued and served by the petitioner to the respondent which was on 25 February 2013. This would have attracted the deeming provision under s 218(2)(a) read with s 218(1)(e) of the Companies Act 1965 that the respondent shall be deemed to be unable to pay its debts; see the cited case of *Campana Distributor Sdn Bhd v Amseal Engineering (M) Sdn Bhd* [1998] 7 MLJ 677; [1998] 2 CLJ Supp 12 which held, inter alia, that:

D

E

F

G

H

[4] Since the respondent failed within three weeks to pay the sum or to secure or compound for it to the petitioner's satisfaction, by virtue of s 218(2)(a) of the Companies Act 1965, they were regarded as being unable to pay their debts. On that ground, without having to consider whether they proved to be actually unable to pay their debts, it was ordered that the respondents be wound up.

I

- A [7] In addition, the aforesaid deeming provision under s 218(2)(a) read with s 218(1)(e) of the Companies Act 1965 having been invoked would have shifted the burden of proof under ss 102 and 103 of the Evidence Act 1950 to the respondent to rebut that they are unable to pay the debts. The petitioner also produced contemporaneous documentary evidence vide exhs 'CCN-2',
- B 'CCN-4', 'CCN-5', 'CCN-6' and 'CCN-7' to prove that the respondent had not indeed disputed the debt nor the interest rate but were contemplating to settle the outstanding debts to the petitioner upon receipt of approval of payments for their complete work/subcontract work from the Ministry of Defence in the approximate sum of RM9,600,000. The respondent contended
- C that exhs 'CCN-6' and 'CCN-7' which were letters written by the respondent's solicitors to the petitioner, were written strictly without prejudice and that they were negotiations for settlement which could not be used by the petitioner as evidence citing *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 FC. The petitioner, conversely, contended that the respondent's solicitor's letters
- D 'CCN-6' and 'CCN-7' are not privileged from being admitted as evidence as they only relate to indirectly the respondent's request for the payments in settlement of the sum still due and owing to the petitioner to be deferred until a later date when the respondent has received the payment for its completed work from the Ministry of Defence. Hence, there was no negotiations between
- E the parties and consequence to that, the 'Without Prejudice' veil should be lifted citing *Daya Anika Sdn Bhd v Kuan Ah Hock* [1998] 6 MLJ 537; [1998] 5 CLJ 200 and *Ted Bates (M) Sdn Bhd v Balbir Singh Jholl* [1979] 2 MLJ 257 FC. From an assiduous perusal of the contents of the respondent's letters
- F 'CCN-6' and 'CCN-7', I do not find that they relate to any negotiations for settlement but that they merely informed the petitioner of some alleged pending payments to be paid by the Ministry of Defence to the respondent and that upon those alleged payments having been received, the respondent would settle the petitioner's debt. In short, the respondent was seeking unilaterally for time from the petitioner to allow the respondent to make payment towards
- G settlement of the sum due and owing to the petitioner when the respondent has received payment for its work done for the Ministry of Defence ie a deferred settlement of the sum still due and owing to the petitioner with the part payment of RM350,000 to be taken into account (letter exh 'CCN-2' from same solicitors of the respondent to the petitioner). In the absence of any
- H negotiations which is the basis of the without prejudice communication, I do not find that the respondent can resort to claim the protection of privilege communication under the without prejudice letters exhs 'CCN-2', 'CCN-6' and 'CCN-7'. A unilateral request for time to make payment towards settlement of a debt due and owing cannot be construed as a negotiation for
- I settlement, see *Ted Bates (M) Sdn Bhd v Balbir Singh Jholl*. From the respondent's aforesaid letters through its solicitors, there has never been any denial or dispute over the sum still due and owing to the petitioner nor any disapproval of the rate of interest charged by the petitioner for overdue payments. Undoubtedly, from the contemporaneous documents, the

respondent has never indicated that it is disputing the petitioner's debt as reflected in the statement of account (exh A) forwarded to the respondent but they reflected a tacit admission of the debt when they sought for time to make payment. Even in this proceeding, the respondent's contention of its dispute of the debt is basically on the part payment of RM350,000 which was allegedly wrongly credited towards the statement of overdue interest and not towards the principal debt as well as the alleged variance of interest but not the principal debt. The respondent does not dispute that it has still owed the petitioner on the principal debt; nowhere in evidence did the respondent aver that it does not owe the petitioner or that it has owed the petitioner for less than RM500 to refute the deeming provision under ss 218(2)(a) and 218(1)(e) of the Companies Act 1965. Moreover, the respondent in its allegation of a dispute has never averred an account to show at the very least that there is bona fide dispute over the debt and not on bare allegation. It was also not known of the financial status of the respondent through any financial statement or any account that the respondent is able and capable of settling the petitioners debts through its assets.

A

B

C

D

[8] On the evidence as a whole, I find that the respondent is still indebted to the petitioner for a sum exceeding RM500 which the respondent has failed, refused and/or neglected to pay the petitioner and I therefore hold that the respondent is unable to pay its debt and that the petitioner is a creditor in this petition against the respondent.

E

[9] The respondent alleged that the petitioner's debt is disputed because of the variance in the rate of interest for the overdue payment which is 2% per month as claimed by the petitioner while it is 1.5% per month as shown in the statement of account (exh A). On these conflicting terms, the petitioner asserted that vide the application for credit account/increase in limit (exh 'CCN-3'), the respondent has agreed and allowed the petitioner at its sole discretion to charge interest at the rate of 2% per month on all outstanding debts, which accrued from the expiry of the credit limit period of 60 days until the date of actual payment. The petitioner contended that this is an agreed term in the contract between the parties and the respondent had never complained about this issue throughout the business transaction and only raised this issue in the respondent's solicitors' letter dated 6 February 2013 (exh 'CSY-1'). To this court, what has been agreed and covenanted by the parties is the 2% per month of interest for overdue payment as stipulated in the exh 'CCN-3' above. Hence, no party to the contract can be allowed to vary any agreed term unilaterally. Although exh A, the statement of account as at 31 January 2013 contained the printed words of 'Interest will be charged on overdue account at the rate of 1.5% per month', there is no evidence that both parties herein had negotiated and agreed upon this new rate of overdue interest per month. Consequently, these printed words cannot be a new agreed term to

F

G

H

I

- A** vary the initial contractual term of 2% of interest per month for overdue payment. I do not find the respondent's contention to be valid to constitute a bona fide dispute on the debt still due and owing by the respondent to the petitioner on this point.
- B** [10] From all evidence before this court, i find that the respondent has not raised a bona fide dispute over the debt still due and owing to the petitioner nor that it has rebutted the deeming provision under s 218(2)(a) read with s 218(1)(e) of the Companies Act 1965.
- C** [11] In conclusion, having considered all evidence and submissions by both parties herein, I am satisfied that the respondent is still indebted to the petitioner in the sum of RM1,382,870.55 for which the respondent is unable to pay or settle. The fact that the respondent has revenue which is forthcoming
- D** is no ground to refute the fact that the respondent is unable to pay or settle its debt still due and owing to the petitioner under s 218(2)(a) read with s 218(1)(e) of the Companies Act 1965 after a legal notice has been duly served on the respondent. I therefore allow the petition vide encl 1 para 11(a), (b) and (c).
- E** *Application allowed.*

Reported by Afq Mohamad Noor

F

G

H

I